

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

IN RE: WORCESTER PUBLIC SCHOOLS

&

BSEA #1404967

MEDWAY PUBLIC SCHOOLS & DESE

DECISION¹

This Decision is issued pursuant to M.G.L. c. 71B (chapter “766”), M.G.L. c. 30A (Massachusetts Administrative Procedures Act) and the regulations promulgated under these statutes. In particular, this Decision involves the interpretation and application of student residency regulations set forth in 603 C.M.R. 28.10. The parties agreed to submit the matter to the Hearing Officer for decision on documents pursuant to BSEA Rule 12 and 801 CMR 1.01(10)(c). All submissions were received by the BSEA by August 4, 2014.

ISSUE

Whether the Department of Elementary and Secondary Education (DESE) acted in conformity with its regulations when it determined that Worcester Public Schools is fiscally and programmatically responsible for Nolan’s² special education.

SUMMARY OF THE FACTS

The pertinent facts are set out in the parties’ written submissions:

1. Nolan is a 14 year old individual with a disability as defined by the Individuals with Disabilities Education Act (IDEA) and G.L. c. 71B, and as such is an eligible student as defined by 603 CMR 28.02(9).

¹ The Hearing Officer gratefully acknowledges the assistance of Amy Reichbach in the preparation of this Decision.

² “Nolan” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

2. Nolan is in the custody of the Department of Children and Families (“DCF”), and has been at all times relevant to this Decision, pursuant to a Child Requiring Assistance petition. M.G.L. c. 119, § 21. (Affidavit of Desmarais; W-2)
3. Nolan has lived in several states and territories of the United States in the course of his life. In 2011, he moved from Puerto Rico to Milford, Massachusetts where he lived with his mother. He then moved with his mother to Marlborough, Massachusetts and subsequently to Milwaukee, Wisconsin. (DESE-1) While in Milwaukee, Student was placed on an IEP, signed by his mother on December 19, 2011, which ran from December 2011 through December 2012. It called for Nolan to attend an “in-district” placement in a substantially separate classroom. (DESE-2; M-A) That is the last accepted IEP in the record.
4. Nolan was home-schooled by his mother in Puerto Rico between June 2012 and May 2013. In May 2013 Nolan moved to Marlborough, MA with his mother. (W-2; D-1)
5. On June 7, 2013, Nolan was admitted to the Cambridge Hospital Adolescent Assessment Unit. Apart from a brief stay at Massachusetts General Hospital for medical treatment, Nolan remained an inpatient at Cambridge Hospital until September 23, 2013. (W-2)
6. On July 26, 2013, in response to DCF’s request for clarification of the Student’s Local Educational Agency (LEA), DESE assigned financial and programmatic responsibility to Marlborough Public Schools based on Nolan’s mother’s residence there and in accordance with 603 CMR 28.10(2)(a).³ (Hearing Request Ex 2)
7. Nolan’s mother moved to Milford, MA in August 2013. On September 13, 2013 DESE issued an Amended Assignment of School District Responsibility finding that Milford was programmatically and fiscally responsible for Nolan’s special education. (Hearing Request Ex. 3)
8. Nolan’s mother moved to Worcester in September 2013. (W-2; W-5; W-6; D-1)
9. On September 23, 2013 DCF placed Nolan in an out-of-state, residential, special education school.
10. Nolan was officially registered with the Worcester Public Schools on October 17, 2013. (W-3)
11. On October 28, 2013, DCF requested that DESE clarify the school district responsible for the special education component of Nolan’s residential placement.
12. On November 4, 2013, DESE assigned sole financial and programmatic responsibility to Worcester Public Schools pursuant to 603 CMR 28.10(3)(d).⁴ (D-3; W-1)

³ “[T]he school district where the student resides...[has] both programmatic and financial responsibility...when students live with their parent(s) or legal guardian.” 603 CMR 28.10(2)(a).

⁴ 603 CMR 28.10(3)(d) provides, in pertinent part: “[w]hen a student whose IEP requires in-district services is placed by the Department of Children and Families in an approved residential school, programmatic and financial responsibility will be with the district where the parent(s) or legal guardian resides.”

13. On November 20, 2013 Worcester's Assistant Special Education Director, Kathleen Desmarais, sent DESE an email requesting an Amended Assignment of School District Responsibility asserting that responsibility should be shared between Worcester, where Nolan's mother lived and Medway, where Nolan's father lived. (D-3; W-7)
14. DESE responded to Worcester's request by return email dated November 27, 2013 writing: "in Response to this email...The assignment dated November 4, 2013 still stands." (D-3; W-7)
15. Worcester filed a Request for a BSEA Hearing on January 16, 2014 challenging DESE's assignment of sole responsibility for the Student's special education program to Worcester. (Administrative Record.)
16. Nolan's father lives in Medway, MA. Nolan has never lived with his father. (W-6)
17. Nolan continues to attend the residential special education school in which he was placed by DCF through the date of this Decision.

LEGAL FRAMEWORK

Pursuant to M.G.L. c. 71B § 3, every city, town and school district is responsible for providing the special education program of any child with a disability "residing therein." The determination, therefore, as to which school district has programmatic and financial responsibility for a school aged child with special needs turns on where the child resides. Citing a comment to the Restatement (Second) of Conflict of Laws, the Supreme Judicial Court has described a person's residence as his domicile, "usually the place where he has his home." *George H. & Irene L. Walker Home for Children, Inc. v. Franklin*, 416 Mass. 291, 295 (1993). "The domicile, or residence, of a minor child generally is the same as the domicile of the parent who has physical custody of the child." *Id.* The DESE's residency regulations recognize this governing principle.

As the Supreme Judicial Court has recognized, the phrase "residing therein" in the statute "is not so obviously self-defining when considerations such as split families, guardianships, children living with foster parents, relatives or friends, and institutionalized children enter the picture." *Id.* at 296 (quoting *Board of Educ. v. School Comm. of Amesbury*, 16 Mass. App. Ct. 508, 512 (1983)). The DESE has been authorized by M.G.L. c. 71B § 3 to develop regulations to provide guidance and to address concerns about determining the residence of a child whose "legal residence may be in some doubt." *Id.*; see 603 CMR 28.10.

At issue in this case is the interpretation and application of 603 CMR 28.10(3)(d) which provides, in relevant part:

When a student whose IEP requires in district services is placed by the Department of Social Services⁵ in an approved residential school, programmatic and financial responsibility will be with the district where the parent(s) or legal guardian resides.

And 603 CMR 28.10(8)(c)(5) which provides:

“If the student’s parents live in two different school districts, such school districts shall be jointly responsible for fulfilling the requirements of 603 CMR 28.00 *except* if the student actually resided with either parent immediately prior to going into a living situation described in 603 CMR 28.10(3) or (4)⁶ then the school district where the student resided with the parent...shall be responsible and shall remain responsible in the event the student goes into the care or custody of a state agency.” (emphasis added)

In reviewing whether the DESE has properly applied the law on residence to the facts before it the BSEA must give due deference to DESE’s interpretation of its own regulations and must uphold that interpretation “unless it is inconsistent with the plain language of the regulation or otherwise arbitrary or unreasonable.” *Moslyn v. Dep’t of Env’tl. Prot.*, 83 Mass App. Ct. 788, 794 (2013); *see Salem v. Bureau of Special Educ. Appeals*, 44 Mass. 476, 481 (2005) (an agency’s “construction of its own regulation . . . is one to which considerable deference is due).

POSITIONS OF THE PARTIES

Worcester argues that DESE misapplied 603 CMR 28.10(8)(c)(5) because Nolan did not actually live in Worcester with his mother prior to going into the residential placement. Immediately prior to his placement in the residential program Nolan was hospitalized. He never resided in Worcester. Worcester contends, therefore, that the “except...” clause of that regulation does not apply. Instead, the two different districts in which Nolan’s parents reside should be jointly responsible.

Medway disputes the contention that Nolan’s father resides in Medway. Moreover, it argues, there is no evidence that Nolan lived in Medway nor that his father has ever had physical custody of Nolan. The IEP from the Milwaukee Public Schools did not include or refer to Nolan’s father.

DESE contends that 603 CMR 28.10(8)(c)(5) was written to resolve the specific question of LEA assignment when, prior to living apart from his parent(s) or legal guardians, a student lived with each of two separated parents who themselves live in two different school districts. Because that is not the fact pattern here, DESE argues, joint responsibility is not contemplated by the regulation. Instead the facts better fit the latter portion of that regulation,

⁵ The Department of Social Services has been renamed. The same entity is now known as The Department of Children and Families (“DCF”).

⁶ The relevant provision under these circumstances is 603 CMR 28.10(3)(d), which covers situations in which a student resides with a parent. 603 CMR 28.10(4) applies where students are in other living situations, including living with relatives, in foster homes, or in group homes. This portion of the regulation does not refer to hospitals.

which indicates that the district of residence of the parent with whom the student actually lived prior to out of home placement by a state agency controls the outcome of the LEA determination.

FINDINGS AND CONCLUSIONS

After careful consideration of the undisputed evidence in the record and of the parties' arguments I find that the November 4, 2013 LEA assignment correctly interpreted and applied the pertinent regulations and should be upheld.

DESE has interpreted 603 CMR 28.10(8)(c)(5) to apply only after DESE has first established that a student physically resides in a location different from his domicile with his parent or guardian. This is consistent with the structure of the regulation. DESE contends that the term "actually resided" in this provision refers to "with whom" a student was last domiciled, not necessarily or solely to the student's physical location. Viewed in the context of the entire regulatory set concerning student residence and LEA responsibility, I find that DESE's interpretation of the regulations at issue here, and the relationship between them in the circumstances of this case, was not "inconsistent with the plain language of the regulation or otherwise arbitrary or unreasonable." *Moslyn v. Department of Env'tl. Protection*, 83 Mass App. Ct. at 794. Nor has there been any credible argument that DESE's interpretation produces an illogical or unjust result.⁷ Furthermore there has been no showing that DESE has at any time interpreted these regulations differently in similar factual situations. Indeed, in prior LEA assignments made during the past year affecting this same family DESE has demonstrated a consistent approach to, and application of, its residency regulations.

In applying these regulations to determine Nolan's residence, DESE focused on several important factors: First, there was no evidence that Nolan had ever lived with his father. Second, Nolan's last accepted IEP called for an in-district special education placement. Third, DCF placed Nolan in an approved residential school. Fourth, an inpatient stay at a hospital does not establish residency in the town in which the hospital is located. In particular the hospitalization of a minor does not establish a domicile apart from the minor's parent. The only place Nolan stayed or slept between the time he actually lived with his mother in Marlborough and his placement in a residential school was a hospital. Therefore Nolan had not established any residence apart from his mother *immediately* before his placement in the residential school. Finally, DESE's previous LEA assignments to Marlborough and Milford, both made while Nolan was hospitalized, were based on the residence of Nolan's mother. DESE's finding that, for purposes of the application of 603 CMR 28.10 (3)(d) Nolan had resided with his mother *immediately* before he entered into his current living situation is consistent with the statute. The fact that Student himself never lived in Worcester is not controlling. *See George H. & Irene L. Walker Home for Children, Inc. v. Franklin*, 416 Mass. at 295 (the residence "of a minor child generally is the same as the domicile of the parent who has physical custody of the child.") Moreover, as DESE indicates,

⁷ Without undermining the result here, it would be dishonest to ignore that DESE's residence regulations are difficult to understand therefore difficult to fairly apply. Worcester's argument that LEA responsibility should be shared with Medway under the circumstances presented here finds substantial support in an objective reading of the relevant regulations and is reasonable. That Worcester's argument does not prevail reflects the necessary deference to DESE's interpretation and administration of its regulations rather than the argument's independent merit.

Massachusetts law anticipates the possibility that responsibility for a child's educational services may fall to a district where he has never resided because his domicile remains with his parents or legal guardian.⁸

Based on the discussion above I find that DESE's Assignment of Responsibility to Worcester is consistent with its previous practice, with MGL c. 766 and its implementing residency regulations, and with judicial precedent.

ORDER

The Department of Elementary and Secondary Education's November 4, 2013 determination that Worcester is the LEA responsible for Nolan's special education program is supported by a preponderance of the evidence in the record and is consistent with DESE's residency regulations and governing statutes. Therefore that determination is confirmed.

By the Hearing Officer,

Lindsay Byrne
Dated: August 28, 2014

⁸ See, e.g.: M.G.L. c. 71B, § 5 (providing for the eventual transfer of programmatic and fiscal responsibility for a child with a disability placed in a residential school whose parent or guardian moves to a different school district on or after July 1 of any fiscal year).